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Supreme Court of the United States

OCTOBER TERM, 1959

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1959

Clerk

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

**PETITION FOR CERTIORARI TO THE COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

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**PETITION FOR CERTIORARI TO THE COURT OF
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Petitioner seeks *certiorari* to review a judgment of the Court of Appeals for the Fifth Circuit, and, in support of its petition, shows:

OPINIONS BELOW AND JURISDICTION

Neither the opinion of the District Court, nor that of the Court of Appeals, has yet been reported. Both opinions are printed in the appendix hereto.

The Court of Appeals rendered its judgment on June 30, 1959. The mandate of the Court of Appeals has been stayed pending disposition of the case by this court.

Jurisdiction of this court lies under 28 USC 1254.

QUESTION PRESENTED

The novel and important question of federal statutory construction presented for review is:

Does 28 USC 1404a, which permits a district court to "transfer any civil action to any other district . . . where it might have been brought", authorize transfer of an admiralty action *in rem*, to a district in which the action could not have been brought—at least without the consent of both parties—because the *res* has never been located in that district?

The affirmative holding by the Court of Appeals in this case is the first appellate decision directly in point; but this holding is in direct conflict with a decision of the United States District Court for the Southern District of New York, that, an admiralty action *in rem* may not be transferred to a district in which the *res* is not located. *Broussard vs The Jersbek*, 140 FS 851 (1956).

It is also in conflict with a dictum of the Court of Appeals for the Second Circuit which, while upholding transfer of an admiralty action *in rem* to a court which had jurisdiction of the *res*, stated that "it is probable that we would hold that the transfer of an *in rem* ad-

miralty case to a court having no jurisdiction or power over the res was unauthorized". *Torres vs Walsh*, 221 F2d 319, 321 (1955).

The holding below also conflicts in principle with decisions by the Court of Appeals for the Fourth Circuit and by the United States District Court for the District of Oregon, that a proceeding *in rem* for condemnation of food or drugs may not be transferred to a district in which the res is not located. *Clinton Foods vs United States*, 188 F2d 289 (CA-1951); *United States vs 11 Cases*, 94 FS 925 (DC Ore.-1950).

The question at issue in this case is closely related to that under consideration in *Hoffman vs Blaski*, now pending in this court (No. 597, October Term, 1958), disposition of which, as the Court of Appeals recognized, "could, of course, undo our action" in this case. See page 18, post.

STATUTE INVOLVED

28 USC 1404a: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

This is an admiralty action for damage to cargo on a barge which sank in 1957 in Wolf River at Memphis. The action is *in rem* against the barge, and *in personam* against the barge's owner.

Shortly after her sinking, the barge was raised and moved to the port of New Orleans.

At the time of the filing of the libel and of the motion to transfer, the vessel was, and still is, within the Eastern District of Louisiana, and subject to jurisdiction *in rem* only within that district.

After the libel was filed, the barge's owner issued to petitioner its letter of undertaking: "In consideration of (petitioner) not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL-585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana and in further consideration of our not being required to post the usual bond for the release of that vessel", the owner, agreed that it would "file claim to Barge FBL-585, and pleadings", and "that, vessel lost or not lost, (it would) pay any final decree which may be rendered against said vessel in said proceeding".¹

The undertaking further stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal (for the Eastern District of Louisiana) under said *in rem* process, and released by the filing of claim and release bond".

¹ The undertaking is printed in the Appendix at pages 21-22, *post*.

The barge owner then appeared in the proceeding in the Eastern District of Louisiana, and filed claim to the barge, and its answer.

Next, the owner filed a motion to transfer the action from the Eastern District of Louisiana to the Western District of Tennessee, where it had instituted a civil action against petitioner for the damage sustained by the barge as a result of the sinking, alleged to have been caused by petitioner's fault in loading the barge.

In granting the motion to transfer, the district court held that "although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar"; and that "the efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident".²

² The district court also suggested that "since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required [under Rule 13(a), Fed. R. Civ. P.] to counterclaim in that action for its cargo damage". But the barge was not a party to the Tennessee proceedings, and accordingly not subject to counterclaim. Further, Rule 82 of the Federal Rules of Civil Procedure provides that the Rules shall not be construed to extend the jurisdiction of the district courts; and since the federal court, on its civil side, could have no jurisdiction over an admiralty action *in rem*, petitioner could not have filed a "third-party" action *in rem* in the civil action in Tennessee, where the barge was not to be found in any event. See *Noma Electric Corp. vs Polaroid Corp.*, 2 FRD 454 (SD NY-1942); *Milburn vs Proctor Trust Co.*, 54 FS 989 (WD La.-1944).

As to the *in-rem* action, the district court held that "since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee".

On appeal under the Interlocutory Appeals Act, the transfer order was affirmed by the Court of Appeals, which conceded that the letter of undertaking requires the action to be treated in all respects as an action *in rem*; but the Court of Appeals held that an *in-rem* action may be transferred to a district "to which the movant consents to an unlimited submission of the cause", despite the fact that the *res* was not located in that district at the time of filing the libel nor at any time thereafter.

ARGUMENT

28 USC 1404a provides affirmatively that an action may be transferred only to another district in which "it might have been brought".

As pointed out by the Court of Appeals for the Fourth Circuit, "it is well settled that a proceeding *in rem* against specific property is local in character and must be brought where the property is subject to seizure under process of the court".

That court further held that since the condemnation proceeding involved in that case "could not have been brought in any other district than that in which (the res was) seized," it is clear that it may not be transferred from that district under the provisions of 28 USCA Sec. 1404(a)".³

The same conclusion was reached in an admiralty action *in rem* by the United States District Court for the Southern District of New York in *Broussard vs The Jersbek*, 140 FS 851 (1956); and the holding in *Broussard* is supported by a dictum of the Court of Appeals for the Second Circuit (quoted, under *Question Presented*, above) in *Torres vs Walsh*, 221 F2d 319, 321 (1955).

In reaching the opposite conclusion in this case, the Court of Appeals for the Fifth Circuit, while acknowledging that the action is *in rem*, refused to follow these direct precedents, and based its contrary decision on its prior holding (now before this court for review) that a transitory action *in personam* may, on the defendant's motion, be transferred to a district in which venue could not have been laid without the defendant's consent.⁴

³ *Clinton Foods vs United States*, 188 F2d 289, 292 (1951); Accord: *United States vs 11 Cases*, 94 FS 925 (DC Ore.-1950).

⁴ Cf. the companion cases of *Ex parte Blaski*, 245 F2d 737 (CA 6-1957), and *Blaski vs Hoffman*, 260 F2d 317 (CA 7-1958), *certiorari* granted, 359 US 904. The Court of Appeals also cited *Andino vs The SS Claiborne*, 148 FS 701 (SD N.Y.-1957), and *May vs The Steel Navigator*, 152 FS 254 (SD N.Y.-1957), as authority for transfer of an *in-rem* proceeding to a district in which the *res* could not have been found; but in each case the vessel, while named in the title of the proceeding, was apparently not seized, nor a letter of un-

Here the question is whether an action *in rem* may be transferred to a court which had no jurisdiction of the *res*, and in which, accordingly, the action "might (not) have been brought"—at the very least in the absence of the consent of both parties.⁵

The district court cases of *The Providence*, 293 Fed. 595 (D R.I.-1923) and *The Yozgat*, 127 FS 446 (ED Pa.-1954), cited by the Court of Appeals for the proposition that a "thing may submit to a particular court", do not support the court's affirmative answer to the foregoing question.

In each of the cited cases, both libelant and claimant agreed to confer jurisdiction *in rem* on the court.⁶

It is petitioner's position that a libelant may not be compelled to litigate an action *in rem* before a court having no jurisdiction of the *res*, by the simple device of an agreement by the owner of the *res* to file a bond with that court.

dertaking given, to perfect *in rem* jurisdiction. Thus, the orders of transfer could have referred only to the *in-personam* action, and those cases stand on equal footing with *Ex parte Blaski*.

⁵ It seems doubtful whether, in any event, jurisdiction *in rem* can be conferred, even by consent of the parties, on a court having no jurisdiction of the *res*; but discussion of that question may be pretermitted for present purposes.

⁶ Nor is the decision of the District Court for the Southern District of New York in *The New England*, 47 F2d 332 (1931), also cited by the Court of Appeals, in point here. In that case, the vessel was in fact seized and released upon claimant's filing a stipulation for value, and the only question before the court was whether libelant could recover in that proceeding a sum greater than the amount of the security substituted for the *res*.

Since it is obvious that this action *in rem* "might (not) have been brought" initially in the Western District of Tennessee, at least without the consent of libelant as well as of claimant, the action cannot be transferred to that district under 28 USC 1404a upon the consent of claimant alone—that consent not being sufficient to confer jurisdiction *in rem* on that court.

The decision below, sustaining such a transfer despite the plain statutory restriction of transfers to a district in which the action "might have been brought", is in direct conflict with the holding of the United States District Court for the Southern District of New York in *Broussard vs The Jersbek*, 140 FS 851, which is supported by the *dictum* of the Court of Appeals for the Second Circuit in *Torres vs Walsh*, 221 F2d 319, 321.

The decision below is also contrary in essence to the decisions of the Court of Appeals for the Fourth Circuit in *Clinton Foods vs United States*, 188 F2d 289, and of the United States District Court for the District of Oregon in *United States vs 11 Cases*, 94 FS 925.

Pendency, on this court's docket, of *Hoffman vs Blaski* (No. 597, October Term, 1958), affords this court the opportunity, by granting *certiorari* in this case, to decide simultaneously two important related questions arising under the statutory provision at issue.⁷

⁷ The Court of Appeals recognized, in its opinion in this case, that this court's disposition of *Hoffman vs Blaski* "could, of course, undo our action". See page 18, *post*.

For these reasons, it is respectfully submitted that the writ applied for should issue.

Eberhard P. Deutsch,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

July, 1959

APPENDIX**ORDER AND OPINION OF THE DISTRICT COURT**

This matter came on for hearing on respondent's motion to transfer this case to the United States District Court for the Western District of Tennessee under 28 U.S.C. § 1404(a).

Present: Malcolm Monroe, Esq.
Proctor for Libellant
Charles Kohlmeyer, Jr., Esq.
Proctor for Respondent

The court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

IT IS ORDERED that this case be, and the same is hereby, transferred to the United States Court for the Western District of Tennessee.

IT IS CERTIFIED that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

PER CURIAM

The damage to the cargo in suit occurred in Memphis when the barge into which it was being loaded at libellant's grain elevator sank. The barge, owned by re-

spondent herein, was also damaged. That damage is the subject of a suit between these parties now pending in the Western District of Tennessee. Most of the witnesses to the sinking reside in Memphis. Although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident.¹

The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge is located at the time the libel is filed.² At that time, and now, the barge is

¹ Since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required to counterclaim in that action for its cargo damage. See Rule 13 (a) Fed. R. Civ. P. Moreover, since the case there is to be tried on the merits on November 19, 1958, a final judgment rendered therein may bar further prosecution of the suit here under the principle of collateral estoppel. See Restatement, Judgments § 58c.

² *Clinton Foods v. United States*, 4 Cir., 188 F.2d 289; *Broussard v. The Jerabek*, 140 F. Supp. 851; *New Jersey Barging Corp. v. T.A.D. Jones & Company*, 135 F. Supp. 97; *United States v. 11 Cases, etc.*, 94 F. Supp. 925.

located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee. Since this order to transfer does involve a serious question of law under 28 U.S.C. § 1404(a), that is, the right to transfer the case as against the barge to the Western District of Tennessee,³ this Court has certified this order for appeal under 28 U.S.C. § 1292(b).

OPINION OF THE COURT OF APPEALS

BROWN, Circuit Judge: May an *in rem* admiralty proceeding upon application of a willing Claimant be transferred under Section 1404(a), 28 USCA, to a district in which the original *res* is not located?

That is the question presented by this interlocutory appeal, certified by the District Judge and subsequently accepted by us. 28 USCA §1292(b). Preliminary to the main problem we are of the view that the interlocutory appeal statute enacted by adding paragraph (b) to former 28 USCA §1292 applies to an order certified as

³ See *Deepwater Exploration Company, et al v. Andrew Weir Insurance Co., Ltd., et al*, D.C., ED La., October 3, 1958, ... F. Supp., and cases cited in Note 2.

dispositive in an admiralty cause.¹ The amendment, to be sure, refers to "a civil action." And since interlocutory appeals were allowed in admiralty from decrees determining rights and liabilities in patent suits finding infringement and certain injunctions, 28 USCA §1292(a)(3)(4)(1); it might be argued that the use of "a civil action" by Congress was a purposeful one to exclude admiralty causes already covered in part. But we see no such limited purpose. We think the term was used in the broad sense to distinguish between criminal litigation, on the one hand, and all others. This accords with the broad nature of orders encompassed by the new interlocutory appeals amendment. Its own words indicate as well that it is to broaden, not restrict, appealability as it refers to "an order not otherwise appealable under this section." Unlike the former situations of decree fixing rights and liabilities in admiralty or for patent infringement, or injunction, the new act recognizes that there may be problems—perhaps of procedure, or sub-

¹ The new portion, found in paragraph (b), was added by 72 Stat. 1770 (September 2, 1958):

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 USCA §1292(b) (1958 Supp.). For a recent discussion of this Act and its operation see Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199 (1959), to be reprinted in 1 Barron, Holtzoff & Wright, Federal Practice and Procedure, §58.1 (1950).

stance, or evidence—in a given case, the decision of which, one way or the other, will effectually dispose of the litigation without the necessity of going through a trial leading to the type of orders already covered under the old Act. Congress meant to put all civil litigation, without regard to its historical divisions of law, equity, or admiralty, within reach of the new Act.

On the merits, the case may be briefly stated. On July 2, 1958, Continental Grain Company filed in the Eastern District of Louisiana a libel *in rem* against the Barge FBL-585 then in the Port of New Orleans, for damage to a targo of soybeans resulting from the sinking of that barge in the Wolf River at Memphis, Tennessee. This was joined with an *in personam* action against Federal Barge Lines. Scarcely a week before, Federal Barge Lines, Inc. through other counsel had filed a civil suit in the Tennessee State Court against Continental Grain Company for damage sustained by Barge FBL-585 as a result of this very same sinking, allegedly caused by negligence of Continental in its loading and care of the barge. That case was removed and was pending for trial in the United States District Court for the Western District of Tennessee at Memphis. The common issue in both cases,²

² How the left hand knew nought of the right in this multi-state, multi-forum amphibious litigation is explained in the briefs. The underwriters on Federal's hull loss and cargo liability, as were those on Continental's cargo loss and its public liability, were different. Each was apparently anxious to manage its own litigation with a seeming indifference to the strong likelihood that under FRCiv.P. 13(a) concerning compulsory counterclaims, or general principles of estoppel by judgment, *res judicata*, or the like, trial of one case would inevitably affect, if not control, the other. See Gilmore & Black, Admiralty 507-08 (1957), and generally, 1 Barron & Holtzoff, Federal Practice and Procedure §394 (1950, and Wright Supp. 1958). The Memphis case was

broadly stated, was whether Barge FBL-585 sank as a result of unseaworthiness or negligent loading.

On the filing of the libel, FBL-585 was not actually seized. In accordance with the practice in New Orleans and all major seaports of maritime litigation, the usual letter of undertaking was given by Federal, providing that in consideration of the Barge not being seized and released on bond Federal would "file claim to Barge FBL-585, and pleadings" and "that, vessel lost or not lost [would] pay any final decree which may be rendered against said vessel in said proceedings." The District Court, in granting Federal's motion under Section 1404(a) to transfer the admiralty cause to Memphis because of the presence of witnesses, the convenience of parties and the pendency of the litigation there, apparently gave some significance to the fact that there had been no actual seizure of the Barge. The parties are at one that fair application of the letter undertaking and particularly the Non-Waiver of Rights Clause³ requires that we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree⁴ with sureties executed and filed by Claimant, and

apparently tried, but we have been kept discretely in the dark as to its outcome. In view of our holding the Court in Tennessee may now have to deal with these problems but wholly unaffected by intimations one way or the other from us.

³ The undertaking expressly stated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said in rem process, and released by the filing of claim and release bond."

⁴ Our reference to the stipulation releasing the vessel in the SS Monrovia, 5 Cir., 1958, 254 F.2d 297,AMC....

the vessel formally released. Any other course would imperil the desirable avoidance of needless cost, time, and inconvenience to litigants, counsel, ships, Clerks, Marshals, Keepers and court personnel through the ready acceptance of such letter undertakings. The Agwisun, S.D.N.Y., 1927, 20 F.2d 975, 1927 AMC 1084, 1088.

Continental's opposition to the transfer is not that the admiralty nature of the proceeding somehow sets up its own moat to prevent a Section 1404 transfer. Rather its contention rests on the terms of that Section, which permit transfer "to any other district or division where it might have been brought." §1404(a).

Since a libel *in rem* requires a *res* and the *res*, at the time of this libel and at the time of transfer, was in New Orleans, not Memphis, the terms of the statute were not met. And, it is further argued, the statute must be read literally since some courts have pointed out that, like a *forum non conveniens* situation, in all cases in which Section 1404 comes into play it presupposes at least two forums in which the defendant is amenable to process. See the full review of this in *Blaski v. Hoffman*, 7 Cir.,

cert. dismissed, 1959, ... U.S., ... S.Ct., 3 L.Ed.2d 723, is somewhat misleading. It is not, as some might think impliedly suggested, a consent appearance or a special agreement of the type lawyers generally refer to as a stipulation in a case. The term stipulation to abide decree is the traditional name given to what others would call a surety bond. Its name derives from the undertaking spelled out in the bond "the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, etc." 2 Benedict, Admiralty, §§363, 368 (6th ed. 1940). Some of the various forms of the districts are set forth at 595-600. The General Admiralty Rules mention stipulations in Rules 4, 5, 11, 12, 24 and 51, 28 USCA. Gilmore & Black, Admiralty 650 (1957).

1958, 260 F.2d 317, now pending on certiorari, U.S., S.Ct., 3 L.Ed.2d 570. But we have not so read the Act. To its literal terms we have, with others, recognized what seems to be to us the obvious implication that a cause may, on proper showing, be transferred to another district to which the movant consents to an unlimited submission of the cause even though it could not have been filed there initially. *Ex Parte Blaski*,⁵ 5 Cir., 1957, 245 F.2d 737.

Even to the most ardent admiralty purist, the result presents no real or conceptual difficulties. The Court does not undertake to transfer the *res*, nor does it even attempt to transfer the cause while the *res* is still in custody of the Court. Before the transfer can be made, a Claim must have been filed and the vessel released under bond (stipulation). Once that is done, the lien on the vessel is discharged for all purposes, ceases to exist, and the release of libel bond is the sole security.⁶

⁵ The *Blaski* litigation is still on its odyssey. A patent suit was filed in the Northern District of Texas and defendant, a resident of Texas, moved for transfer to the Northern District of Illinois where the validity of the same patent was involved in extended pending litigation. We denied leave to file mandamus to prevent the transfer. *Ex Parte Blaski*, 5 Cir., 1957, 245 F.2d 737. When it got to Chicago, the District Judge accepted it, although reluctantly. The Court of Appeals for the Seventh Circuit, after first approving the transfer, later changed its views and granted mandamus to prevent the Judge accepting the transfer ordered out of this Circuit. *Blaski v. Hoffman*, 7 Cir., 1958, 260 F.2d 317. Like the man without a country, this litigation has been expatriated from Texas; it has been denied admission to Illinois. To solve this impasse was presumably what led the Court to grant certiorari, U.S., S.Ct., 3 L.Ed.2d 570. That decision could, of course, undo our action.

⁶ See Judge Woolsey's full discussion of this in *The New England (J. K. Welding Co. v. Gotham Marine Corp.)* S.D.N.Y., 1931, 47 F.2d 332, 1931 AMC 407. "The stipulation

Traditional notions are not affected if that security floats with the cause wherever the law navigates it.

Nor does this alter in any way the characteristics of the libel *in rem*, or the historical, actual, or supposed nature of the liability of the ship as the thing. See Gilmore & Black, Admiralty 483-510 (1957). The libel begins as one *in rem*. It retains that status until the final decree, regardless of the place it pends. If as a libel *in rem* it has advantages or disadvantages, procedural or substantive, they follow the proceeding regardless of geography. And, of course, in ordering a transfer upon the application and consent of the Claimant, the "confer-^{ing}" of jurisdiction upon the transferee court over a cause which would never have come its way had it been essential that the vessel be within its territory is no different than the time-honored practice in the initial filing of libels *in rem*. The subject matter being within the Court's jurisdiction, the parties and the cause being real and justiciable, a party or thing may submit to a particular court. And whether thought of in terms of waiver or consent, it is, as every proctor knows, done on a very large scale. 2 Benedict, Admiralty 78 (6th ed. 1940); *The Providence*, D.R.I., 1923, 293 Fed. 595; *The New England*, see note 6, *supra*; and *Yozgat (P. Diacon-Zadeh v. Devlet Denizyollari)*, E.D.Pa., 1954, 127 F.Supp. 446, 1954 AMC 2146.

We are not dealing with a coercive transfer, neither sought nor consented to by the Claimant. *Broussard v.*

for value is a complete substitute for the res, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the res in the court's custody * * *." 47 F.2d at 335. See also Gilmore & Black, Admiralty 650-51 (1957).

The Jersbek, S.D.N.Y., 1956, 140 F.Supp. 851, 1956 AMC 1575. We deal here only with a voluntary request seeking and consenting to the transfer. We join others in recognizing that this may be done. *Torres v. Walsh*, 2 Cir., 1955, 221 F.2d 319, 1955 AMC 1181, cert. denied, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746; *Andino v. The S.S. Claiborne*, S.D.N.Y., 1957, 148 F.Supp. 701, 1957 AMC 526; *May v. The Steel Navigator*, S.D.N.Y., 1957, 152 F.Supp. 254, 1957 AMC 1832.

As we find the transfer within the power of the District Court, we need only state as to the propriety of the exercise of that power that we find no basis for concluding that the Judge abused his discretion. The rule announced in *Ex Parte Charles Pfizer & Co.*, 5 Cir., 1955, 225 F.2d 720, is applicable and controlling.

AFFIRMED.

JUDGMENT OF THE COURT OF APPEALS

Extract From the Minutes of June 30, 1959.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

(LETTER OF UNDERTAKING

July 23, 1958

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 in Adm., E.D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL 585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel,

We agree that we shall, within the delays allowed by law, and/or the rules of court, file claim to Barge FBL 585, and pleadings in the above-entitled and numbered action; and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

Very truly yours,
FEDERAL BARGE LINES, INC.
By /s/ Noble C. Parsonage
NOBLE C. PARSONAGE
Vice President-Treasurer